No. 7695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUS B. GREENBAUM, CHARLES GREENBAUM and WILLIAM GREENBAUM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

BRIEF FOR APPELLEE

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BIMS PRINTING CO.

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OPENING STATEMENT

The "statement of facts" contained in appellants' brief could more properly be indexed "argument". The so-called "facts" are largely conclusions of law and facts based upon a part of the record only. We

shall, in our answers to the questions raised by the brief, supply the material part of the evidence necessary to arrive at the ultimate facts proved by the Government. At this point, however, we deem it advisable, and feel it will be helpful to the Court, to point out a few of the instances where appellants have drawn erroneous conclusions from the evidence.

In referring to the Clarence Saunders Stores, Inc., under its various corporate names, we shall follow the practice adopted by appellants and refer to it as "the corporation" or "the company".

On page 11 of appellants' brief is the statement that appellants had nothing to do with the organization of the company. If by this is meant that appellants signed none of the applications or incorporation papers and were not named as incorporators, the statement would be true. The testimony, however, makes it clear that appellants were not only interested in the incorporation of the company but took an active part in the preliminary conferences and negotiations. Mr. Sanders testified that he had a conference with William Greenbaum in the latter part of 1928 "in which he asked me if I thought *we* could get a concession from Clarence Saunders" (345).* The word "we" is significant, as appellants' apparently realize, for in their brief the testimony is edited by substituting the word "he" (meaning Sanders) for "we" (meaning the Greenbaums and Sanders). The record shows that the matter was discussed with all of the appellants several times (345). Sanders further testified that he went to his attorney's office,

* Unless otherwise indicated, figures in parentheses refer to pages of the printed transcrip of record.

accompanied by at least one of the appellants, and that there was a discussion about preorganization stock (345). Appellants had been selling some stock for Sanders in the Piggly-Wiggly Southwestern Corporation and it is apparent that, following the conclusion of that business, appellants themselves conceived the idea of capitalizing on the name of defendant A. E. Sanders by securing a concession from Clarence Saunders and using it as the basis of a stock selling scheme. They did not even want to wait until the corporation had been formed but immediately suggested the sale of preorganization stock. One of the appellants accompanied Sanders to Tennessee to interview Clarence Saunders (345, 352).

Attached to and a part of Government's Exhibit 16 (231) is a statement of the condition of the company, prepared and presented by Sanders' attorney to the Arizona Corporation Commission. Appellants, on page 17 of their brief, claim that this statement shows the progress being made by the company. The application (Government's Exhibit 16) was admitted as evidence of one of the steps in completing the scheme charged. The representations contained in this exhibit are evidence only that such representations were made. In no way could this evidence be considered as proof of the financial condition of the company. We consider this of minor importance, however, in the determination of this appeal. On the question of the sufficiency of the evidence, we are confident that the evidence preponderates so overwhelmingly on the side of the Government and so conclusively proves the guilt of appellants that the Court will have little trouble disposing of that issue.

Let us now examine Government's Exhibit 18 (245), which, on page 19 of their brief, appellants say shows a total net worth as of May 31, 1930, of $966,413.88. We desire to point out to the Court how it was possible, as a matter of bookkeeping, to show this net worth. Later we will call the Court's attention to the record where there is proof that appellants knew the true condition of the company as to there being any earned surplus. The Court is well aware of the fact that items such as accounts receivable, carried as an asset of $135,685.99 (236), might not be worth ten cents on the dollar. It will also be plain to the Court, after reading the record in this case, that the item "concessions", carried as an asset of $151,000, was of no value to the corporation. The stock subscription item of $122,030.51 (237), when and if paid, must be offset by a liability item of "stock outstanding". Practically all of the deferred charges carried as an asset at $79,903.93 (237) are, in fact, expense items and finally under "liabilities" we find "capital stock" carried at $10.00 (237), with no indication of the number of shares outstanding.

If appellants contend that the condition of the company warranted the extravagant representations made by them, they should have introduced some evidence to overcome the direct evidence of the Government which conclusively proved the condition of the company, the false representations of appellants and the fact that they knew they were false.

What we have just said is true also of Government's Exhibit 22 (249) referred to on page 19 of appellants' brief. In this statement common stock is carried as a liability at $10.00 only. The item "other

assets", carried at $520,887.98, undoubtedly is made up, among other things, of "stock subscriptions" and "concessions", either one of which would wipe out the surplus shown.

On page 30 of appellants' brief, an effort is made to create the impression that the surplus shown on the statement of December 31, 1929, Government's Exhibit 40 (335), was an earned surplus. It is true that Brandt testified he could not determine from the *statement itself* whether it reflected an earned or capital surplus. He did testify, however, from his own knowledge, that it was a capital surplus (337). The Court will note that in this statement, outstanding common stock is still carried as a liability at $10.00 (336). This statement is more enlightening than the previous ones, however, for it shows that there were 216,581 shares outstanding. None of these shares sold for less than $5.00 and the price ranged from that to $10.00. It does not take an expert accountant to discover what would become of the $33,780.46 capital surplus shown in this statement if a proper charge had been entered for outstanding stock.

We cannot permit to go unchallenged the gratuitous reflection on the addition of the accountant found at the top of page 38 of appellants' brief. The record shows that while under examination on the stand, the witness made a mental calculation, adding three numbers of six figures each, $304,644.88, $215,378.47 and $151,000, and estimated the total at *about* $679,000. It is apparent that the figure was an approximation only (380).

ARGUMENT

We will now proceed to points raised in appellants' argument and will discuss them in the same order they appear in appellants' brief, beginning with Proposition I, on page 86.

I

SUFFICIENCY OF INDICTMENT

This proposition is based upon Specification of Error I. Appellants contend that the indictment is defective because it is vague, indefinite, uncertain and incomplete, and also because it is duplicitous. The authorities cited by appellants in support of this contention are to the effect that an indictment, suffering with the disabilities above enumerated, is insufficient to support a conviction, with all of which we readily agree. Appellants meet with difficulty, however, in applying this well established rule of law to the indictment under consideration. They failed to cite a single case involving violation of Section 338, Title 18, United States Code, where an indictment in the form of the one involved was held defective.

The gist of the offense is the use of the mails to defraud. The scheme need not be pleaded with all the certainty as to time, place and circumstances required in charging the gist of the offense.

Brady v. *United States*, 24 F. (2d) 399, 402.

Redmond v. *United States*, 8 F. (2d) 24.

Mathews v. *United States*, 15 F. (2d) 139.

Cowl v. *United States*, 35 F. (2d) 794, 798.

All that is required is to set forth the scheme with sufficient certainty to acquaint the defendant with the charge against him and to enable him to prepare his defense. In the Brady case, supra, the Court said:

> "The indictment clearly alleged that the purpose of the scheme was to defraud the Union National Bank by obtaining money and property."

The present indictment clearly alleges that the purpose of the scheme was to obtain money and property from the persons named and the public generally by means of false and fraudulent pretenses, representations and promises (3). The allegation of the indictment that "prior to the dates on which letters were mailed, as hereinafter alleged in the several counts * * * " has been approved by the courts.

Hyney v. *United States*, 44 F. (2d) 134, 136.

Munch v. *United States*, 24 F. (2d) 518.

Chew v. *United States*, 9 F. (2d) 348.

In the Hyney case just cited, the allegation was as follows:

> "That before and at the several times of the commission of the several offenses hereinafter set forth, defendants had devised and did devise a certain scheme * * * ". (44 F. (2d) 136).

This allegation was attacked on the ground that it alleged several different schemes. In upholding the indictment, the Court said at page 136:

> "It is, of course, necessary that each count should embrace a distinct offense but this may be accomplished by proper reference in any one count to any other, as was done in this case, the first count referring to the dates of the different offenses as set forth in the succeeding counts * * * ".

This case fully answers appellants' contention that they were confronted with a claim that they devised a single scheme on various dates, and that they mailed a letter ten months before the final fruition of the scheme.

The first count of the present indictment was sufficient in itself, even if the sustaining of the demurrer to the remaining counts removed the point of reference as to those dates. The courts hold, however, that the point of reference is not lost under those circumstances.

Burroughs & Cannon v. *United States*, 290 U. S. 534, 544.

Crain v. *United States*, 162 U. S. 625, 633.

While the matter is mentioned in the brief, appellants do not cite any authorities in support of their attack upon the allegation in the indictment charging "a scheme and artifice to defraud *and* to obtain money, etc." In many of the reported cases, we find this allegation in the conjunctive, as in the present indictment.

Crane v. *United States*, 259 Fed. 480 (C. C. A. 9).

We have found no case where the indictment was held to be defective because of such an allegation.

It is also true that the practice of alleging in successive paragraphs parts of the scheme is followed in most of the cases involving this same offense, and this practice has been approved by the appellate courts.

Havener v. *United States*, 49 F. (2d) 196.

Brady v. *United States*, 24 F. (2d) 399.

The case of *Fontana* v. *United States*, 262 Fed. 288, relied upon by appellants, is easily distinguishable from the present case. Fontana was charged with violation of the Espionage Act. In that case, the statements which the defendant was charged with making were the gist of the offense. It was necessary, as the Court said, that it be made to appear from the allegations of the indictment that the statements were made at a time and under such circumstances as to clearly show a violation of the law. In the present case, the representations appellants are charged with making are not the gist of the offense. The making of these statements in itself violated no Federal statute. It is a universal rule adopted by all courts that the scheme need not be pleaded with all the certainty of the gist of the offense.

We quote from *Brady* v. *United States*, supra, page 402:

> "While the formation of a scheme or artifice to defraud is an essential element of the offense

defined in section 215, supra, the gist of the offense is the use of the mails for the purpose of executing or attempting to execute such scheme, and it is therefore sufficient to charge the scheme with such particularity as will enable the accused to know what is intended and to apprise him of what he will be required to meet on the trial."

Cowl v. *United States*, 35 F. (2d) 794, 798.

Havener v. *United States*, 49 F. (2d) 196, 198.

The indictment warned appellants with sufficient definiteness of what they would have to meet. They knew that they were charged with selling and offering for sale the capital stock of the Saunders Corporation and with making false representations to the purchasers and the public generally with respect to the financial condition of the company, the management, payment of dividends and the value of the stock. Approximately two years elapsed between the date of the return of the indictment and the trial of the case. If appellants required any more specific information than that contained in the indictment in order for them to properly prepare to meet the charge, their remedy was to ask for a bill of particulars.

Appellants' second contention under the first proposition is that the indictment is duplicitous. They contend that the allegations to the effect that the U-Save Holding Corporation acquired a majority of the capital stock of the United Sanders Stores and removed certain merchandise, charged a separate scheme to defraud stockholders. It must be remembered in this connection that there are five defendants named in

the indictment, including A. E. Sanders, who entered a plea of nolle contendere, and H. D. Sanders, who was not on trial. The failure in the proof to connect H. D. Sanders with the scheme charged, if there was such failure, would not affect the guilt of any of the other defendants. The gaining control of the company by the U-Save Holding Corporation and the removal of merchandise might, as claimed, be a fraud on stockholders but that would not prevent it from also being a part of the original scheme to defraud and obtain money or property by false representations. Quite frequently false representations are made in connection with successful enterprises. The success or failure of the undertaking does not enter into the guilt of the party. In many cases it is a part of the scheme that, in the event the undertaking is successful and makes a profit, this profit will be confiscated by the schemers for their own advantage and to prevent the victims from enjoying the expected or unexpected profits. The failure of proof of this phase of the scheme does not affect the validity or sufficiency of the indictment.

Butler v. *United States*, 53 F. (2d) 800.

Havener v. *United States*, 49 F. (2d) 196, 199.

Cowl v. *United States*, 35 F. (2d) 794, 798.

Marcante v. *United States*, 49 F. (2d) 156, 158.

Kaplan v. *United States*, 18 F. (2d) 939, 943.

There is but one scheme charged in the indictment and that was the scheme to obtain money and prop-

erty by the sale of stock and debenture bonds of the Clarence Saunders Stores and its successors by false and fraudulent pretenses, representations and promises. The organization of the corporation was not the scheme itself, nor was another scheme hatched under the name of Greenbaum Brothers and the Bond & Mortgage Company. These acts alleged in the indictment and proved by the evidence were merely the means used in carrying out the original scheme. This applies also to the charges in connection with the organization of the Piggly-Wiggly Holding Corporation, the changing of the name, the acquiring by the U-Save Holding Corporation of a majority of the common stock of the company, etc.

It was not necessary for appellants to have had an active part in the Piggly-Wiggly Holding Corporation or the U-Save Holding Corporation or the removal of the merchandise. All who, with criminal intent, join themselves, even slightly, to the principal schemer are subject to the statute, although they know nothing but their own share in the aggregate wrong doing.

Silkworth v. *United States*, 10 F. (2d) 711.

Schwartzberg v. *United States*, 241 Fed. 348.

Wilson v. *United States*, 190 Fed. 427.

The above and other authorities also hold to the effect that an indictment which sets forth two modes of operation by which defendants plan to carry out their scheme to defraud is not duplicitous.

McLendon v. *United States*, 14 F. (2d) 12.

Gourdain v. *United States*, 154 Fed. 453.

The scheme to defraud and the means by which it was to be carried out are to be distinguished from each other. L

Sunderland v. *United States*, 19 F. (2d) 202.

The unity of the alleged scheme and artifice to defraud sufficiently appears from the indictment and the various means to that end which the indictment charges do not, in themselves, constitute allegations of separate schemes.

Scheib v. *United States*, 14 F. (2d) 75.

The case just cited is very similar to the case under consideration. The scheme charged had for its purpose selling to the public stock of the Hawkins Mortgage Company and its subsidiaries, various so-called welfare societies. It is charged that the defendants encouraged the Hawkins Mortgage Company to purchase or otherwise obtain control of other mortgage and loan companies which were supposed to be in trouble but which had assets of value, and to enter into arrangements whereby the Hawkins Mortgage Company would control the Board of Directors of such other companies, and through false representations as to the value of the stock induce those who held stock or controlled interest in such other companies to exchange same for stock of the Hawkins Mortgage Company. There were many other details of this scheme set out in the indictment in the Scheib case similar to the allegation in the indictment in the present case. In answer to the charge that the indictment in the Scheib case was duplicitous, the Circuit Court of Appeals for the Seventh Circuit said:

"The general purpose of inducing persons to buy or exchange for stock of the Hawkins Mortgage Company and of the welfare societies, to the distinct disadvantage of such persons, runs through the entire indictment. Surely each separately alleged manifestation of the same general purpose to defraud the public does not constitute a distinct scheme or artifice, but is only a detail in the general plan to induce persons to part with money or other valuable thing in exchange for practically valueless stock. The unity of the alleged scheme or artifice to defraud sufficiently appears from the indictment, and the various means to that end which the indictment charges do not in and of themselves constitute allegations of separate schemes, artifices, or conspiracies." (14 F. (2d) 77).

In a case where the indictment charged a scheme to sell interests in five separate tracts of land which were falsely and fraudulently represented to contain gas, the Court held that the indictment was not duplicitous. None of the letters mailed for the purpose of carrying out this scheme referred to all the tracts.

Sconyers v. *United States*, 54 F. (2d) 68.

If there is but one general scheme to defraud and numerous means for effectuating the same, it is not bad for duplicity.

Worthington v. *United States*, 64 F. (2d) 936.

This is one of the latest decisions on this point.

We quote the following from the opinion in the Sunderland case, supra:

"In the case at bar the contention of plaintiffs in error is that the indictment sets out two schemes to defraud; that it sets out two groups of defendants; each group being engaged in a separate scheme - - One group being engaged in the sale of securities of the Guaranty Securities Company and its allied companies and banks, the other group being engaged in the sale of securities issued by the Colonial Timber & Coal Corporation.

"This contention fails to grasp the full scope of the indictment. The offense charged in each count, except the conspiracy count, is the use of the mail in furtherance of a scheme for obtaining money by means of false and fraudulent representations. The indictment alleged that one group of defendants were in control of certain trust companies and banks; that they, in cooperation with a second group of defendants, devised a scheme in accordance with which they should form a new corporation, the Colonial Timber & Coal Corporation; that this new corporation, under cooperative management of all the defendants, should issue its stock and bonds and sell a portion of the same to the financial institutions controlled by the first group of defendants; that another portion should be sold to the general public through the same financial institutions; that still a third portion should be allotted without consideration to the defendants themselves; and furthermore, that the same financial institutions, owning among their assets large amounts of bonds and stock of the Colonial Timber & Coal Corporation, should sell to

the public, stock, bonds and certificates of their own issue, based upon their own assets, which included said stock and bonds of the Colonial Timber & Coal Corporation.

"Though the scheme thus alleged was complex in its nature, and manifold in its details, it was but a single scheme in which the ties of cooperation bound together the various defendants, though some controlled one corporation and some another."

Appellants earnestly urge that the allegation in the indictment to the effect that H. D. Sanders and his associates organized the U-Save Holding Corporation, renders the indictment uncertain and duplicitous, first, because it charges a separate scheme and, second, the associates are not named. H. D. Sanders was one of the defendants and any acts of his, committed in furtherance of the scheme, would be chargeable to each of the co-defendants. This does not mean, however, that every individual with whom H. D. Sanders associated himself or did business with, would thereby become one of the schemers and liable to prosecution. His associates in the organization of the U-Save Holding Corporation might or might not have been knowingly engaged in the plot or scheme alleged in the indictment. Here, again, if appellants required any more specific information, their remedy was to ask for a bill of particulars.

We will not attempt to discuss or analyze all of the cases cited by appellants in support of their first proposition. Those involving violation of the liquor laws and the joining together in a single count in an

indictment two separate and distinct crimes or offenses are clearly not applicable. In discussing these cases in their brief appellants set out enough of the facts from which the inapplicability of these cases clearly appears and we are willing to submit them to the Court upon the statements contained in appellants' brief. We will discuss only those where a violation of the mail fraud statute is involved.

In *McLendon* v. *United States*, 2 F. (2d) 660, the indictment charged defendant with having devised a scheme to defraud in the execution of which he mailed circulars containing misrepresentations regarding dogs which were offered for sale. The indictment was in eight counts and defendant was convicted on counts 1 and 3. The Court said that a verdict on the first count should have been directed because the proof did not tend to show the use of the mail in the execution of the scheme alleged. The Court said, however:

> "We do not reach the same conclusion as to count 3."

The letter specified in count 3 was held to contain matters that were pertinent to the scheme of the indictment. The case was remanded for a new trial because of errors not pertinent to the issues in this case. The indictment itself was upheld and we fail to see what comfort appellants can derive from the decision.

If we were to admit all that appellants say in regard to the counts involving letters written in connection with the exchange of stock of the Saunders Company for stock in the U-Save Holding Corporation and concede that those letters were not written and mail-

ed in execution of the scheme alleged in the first count, under the McLendon decision, relied upon by appellants, the indictment as to the first count should be upheld, applying the reasoning of the McLendon case. The failure of the subsequent counts because of the defects claimed by appellants, would not destroy the effectiveness of the first count.

The case of *Beaux Arts* v. *United States*, 9 F. (2d) 531, relied upon by appellants, does not support appellants' position in this case. There the Court held that there was a misjoinder of offenses. The indictment was in three counts. One of the counts was dismissed by the trial court, a verdict of acquittal returned as to one count and a verdict of guilty as to the other count. The Court held that the verdict of acquittal cured the defect of misjoinder and affirmed the judgment on the remaining count. The appellants in this case are relying on some of the counts to which a demurrer was sustained to establish that the first count was duplicitous and that there was a misjoinder. This, of course, they cannot do. They are limited to the first count alone. If there are any fatal defects in that count, those defects must be made to appear from the language of that count itself and the two cases just discussed and cited in appellants' brief support the Government's position.

II

ADMISSION IN EVIDENCE OF STATEMENTS PREPARED FROM BOOKS OF ACCOUNTS

This proposition covers the objection of appellants to the introduction in evidence of Government's Ex-

hibits 89, 90 and 91. Exhibit 89 is a profit and loss statement of the corporation for the year 1929 (366). Exhibit 90 is a similar statement for the period ending September 30, 1930 (374). Exhibit 91 is a balance sheet showing net worth on September 30, 1930 (378).

Appellants' contention is that the books and records underlying these exhibits would not be admissible against appellants and that, therefore, the statements themselves were not admissible. We believe that the determination of the admissibility of the books and records will determine the merits of appellants' Proposition II.

On page 129 of their brief, appellants set forth the grounds upon which Proposition II is based. Appellants' contention that, because they had no connection with the books and had no control over them, the books would be hearsay as to appellants, has no support in the authorities cited by appellants and we have found none supporting that theory.

The Government, having produced evidence of representations made by appellants relative to the financial status of the corporation, its management, earnings, profits and future prospects, it then became incumbent upon the Government to prove the falsity of one or all of these representations. The books and records were competent evidence to prove the facts which, in turn, would prove the falsity of appellants' representations.

Butler v. *United States*, 53 F. (2d) 800, 806.

Quoting from *Butler* v. *United States,* supra (806):

> "It is objected that there was no proof that appellant made the entries in the books nor that he was responsible for them, and cases are cited where defendants were charged with making false entries and proof was properly required that the defendants either made the entries or were responsible for them being made. But there is no such charge here; the contents of the books were offered to prove a fact material to the inquiry. Books of account are often received to prove a material fact, where the opposite party has no connection with the books or the business reflected by them.
>
> *Barrett* v. *United States* (C. C. A. 8) 33 F. (2d) 115."

The authorities cited by appellants in support of their position are easily distinguishable from the case at bar. We believe it will only be necessary to point out this distinction as to one or two of the cases.

Appellants cite *Osborne* v. *United States,* 17 F. (2d) 246. They claim that the grounds of admissibility in the Osborne case are not present in the case at bar. The two cases are entirely different. While the Osborne case was a prosecution for the use of the mails in a scheme to defraud, the books were offered in evidence to prove the actual fraud. The defendants were accused of selling the same tract of land to different purchasers. The books were offered for the purpose of showing that the tracts actually were so sold. Under these circumstances, it would, of course, be necessary to connect the defendants with the books

and to show knowledge on their part of the contents. The purpose of the books in the case at bar is to prove a fact, namely, the condition of the corporation. They were competent evidence of that fact, irrespective of whether they were kept by the defendants or not.

The case of *Chaffee & Co.* v. *United States*, 18 Wall. 516, 21 L. E. 908, cited by appellants, was a civil suit to recover a penalty under the Revenue Act for having possession of distilled spirits. Books of certain collectors of tolls were offered in evidence. We believe this statement is sufficient to show that the rule under a situation such as existed in the Chaffee case is entirely different from the rule applicable to the facts in the present case.

In the civil case of *Hagan Coal Mines* v. *New State Coal Company*, 30 F. (2d) 92, cited by appellants, a summary taken from the books of the defendant was introduced in evidence in defendant's favor for the purpose of proving a claim against plaintiff. It is obvious that the fact sought to be proven in the Hagan case is entirely different from the fact to be proven in the present case. It is also clear from the opinion in the Hagan case that there was a total lack of any foundation for the introduction of the summary. The only evidence in that connection was that the books were the books of the defendant.

We are not contending that the keeping of the books was, in itself, a crime. There was evidence introduced tending to prove that appellants knew that the representations made by them were false. The representations which are found in several of the letters and circulars in evidence, to the effect that the

corporation was a "Clarence Saunders" corporation and "under the guiding hand of Clarence Saunders" (275, 296), were known by them to be false or were made in reckless disregard of the truth. Government's Exhibit 45 (275) contains the following statement:

> "You will find that your investment in Clarence Saunders Stores will be one of the most profitable ever made", and "with Clarence Saunders' guiding hand over the different stores to be established under his name, * * *".

In Government's Exhibit 63 (296), which was a letter from the Bond & Mortgage Company (appellants' corporation) the following statements occur:

> "The stores were created by a genius in this particular line of merchandising. Clarence Saunders, through his wonderful merchandising methods, established the Piggly-Wiggly stores, and when retired had built a business in a few years that was prosperous and known all over the world, and his new stores are just as much advanced in modern merchandising as his old stores were over the old style grocery. With Clarence Saunders' guiding hands over the different stores to be established under his name, we can only say one thing and that is, within a few years you will find Clarence Saunders Stores the outstanding food distribution stores in the world."

Part of the foregoing quotation is almost identical with statements found in letters sent out over the stamped signature of A. E. Sanders.

Appellants took part in the preliminary negotiations for the incorporation of the company (345), and they therefore must have known that Clarence Saunders' only connection with the corporation was a franchise which permitted the use of his name and fixtures. Furthermore, the appellants knew the financial standing of the corporation for they were furnished statements taken from the very books and records upon which the questioned exhibits were based (334). They knew the corporation was not earning profits and they knew that dividends were paid out of capital rather than earned income (329-330).

Government's witness Brandt testified that Gus Greenbaum, one of the appellants, was present in a conversation between the witness and Mr. Sanders when the statement was made that the corporation had no earnings (329) and a record showing the operating loss was produced (330). The evidence, therefore, shows that appellants had knowledge of at least some of the contents of the books and records marked for identification and used as a basis for the exhibits. Knowing what they did about the corporation, their misrepresentations not only as to the present condition of the corporation but as to its future, were made either knowingly or with such reckless disregard of the truth as to render them criminally liable under the statute involved. 49 C. J. 1204, Sec. 225. In this connection, it is important to remember that it is not the representations themselves that constitute the crime. It is the use of the United States mails.

Appellants complain that the questioned exhibits do not cover the time of the alleged commission of the crime and that the periods covered by the exhibits are

too remote to constitute proof of the falsity of appellants' representations. Exhibit 89 is a profit and loss statement covering the year 1929. The representations of appellants as to the financial condition of the corporation, its management and its earning of profits refer to this period of the corporation's history. It is not necessary that the misrepresentations be made the day the mails are used. The same is true of Exhibit 90 and Exhibit 91, which covered the earnings of the corporation for the period from January 1, 1930, to September 30, 1930. We believe that the weight to be given this evidence under all the circumstances was for the jury. It is true the indictment letter was mailed April 9, 1930. That date comes within the period covered by these exhibits, and the date September 30, 1930, falls within the period covered by the representations of appellants as to the condition and management of the corporation.

Furthermore, appellants made repeated representations as to the future development, growth and earnings of the corporation. These representations were based upon premises known by appellants to be false, and only a miracle could have prevented such representations from being false. The condition of the company on September 30, 1930, as well as the fact that it operated at a loss during the first nine months of 1930, would be competent evidence of the falsity of those representations, just as would the fact that shortly thereafter the company went into receivership.

Richards v. *United States*, 63 F. (2d) 338, 340.

Had appellants' representations as to the future prospects been based upon a true condition or premise

at the time they were made, and had some factor intervened between the time of the representations and the date of the statements (Exhibits 91, 92), which intervening factor had brought the change in the fortune of the company, there might be some merit in this contention of appellants. One cannot, in the face of present conditions and facts, make representations, not only as to those conditions and facts but as to the future, when such representations are contrary to all reason and possible expectations.

Appellants contend that reversible error was committed because they were not given sufficient time to examine the books and records. The same procedure was followed in this case that has been followed in all cases involving fraudulent use of the mails. If defendants can wait until the day of trial and then demand time in which to audit books and records, the trial of this class of cases, which even under present practice is often too long delayed, would be postponed and continued to such an extent as to render the statute ineffectual. The books in this case were not seized by the Government at the initiation of the prosecution. They were never under the Government's control. From the record it appears that the books identified in Court had been in the hands of the receiver (266-267), or in evidence in litigation pending in the State Court (372-373), for a long period of time. One of the defendants, A. E. Sanders, was an officer of the corporation. The books, while in the hands of the receiver or while in the possession of the Clerk of the State Court, were as available to appellants as they were to the Government.

The indictment was returned against appellants in

February, 1933, approximately two years prior to the trial. Appellants were represented by able and resourceful counsel, who must have known how to gain access to these books, and who must also have known that these books would play an important part in the trial. One of the financial statements of June 30, 1930 (250), bears the certificate of John W. Wagner, C. P. A. The same John W. Wagner was sworn as a defense witness at the beginning of the trial, excused from the rule and remained in Court during the trial (137), but was never called to the stand. In view of the foregoing facts, the contention of appellants that they had not sufficient time to examine the books and records is wholly lacking in merit, not to mention sincerity.

It is not necessary to introduce in evidence the books and records themselves. It is proper to use an auditor to testify regarding the books and as to what they disclose.

Butler v. *United States*, 53 F. (2d) 800, 805.

We quote from page 805 of the above case:

> "It is objected that the books were not introduced in evidence; the books were available to both sides; they were identified, and that is sufficient. To introduce them would have been a meaningless formality. An auditor may testify as to what is disclosed by books of account, if the books are identified as those regularly kept in the course of business, and if the books are available for purposes of cross-examination." (Citing cases).

The same procedure has been approved by this Court.

Arine v. *United States*, 10 F. (2d) 778 (C. C. A. 9).

This leaves as the only remaining question to be determined the question of the identification of Government's Exhibits 34 to 39 for identification, which exhibits were the basis for the auditor's testimony and of Government's Exhibits 89, 90 and 91. We believe that this can best be presented by summarizing the testimony going to the identification of these exhibits.

Government's witness Brandt testified he was "employed by the company from September 15, 1929, to August, 1930"; that during his connection with the company his duties were to maintain the records of accounts and the usual duties of a comptroller (251). He identified the books in Court as the books and records of the company and that the entries were made by parties employed by the company (252). He further testified that, covering the period prior to his employment, he had made an audit balancing the books and that all entries were correct (253-255).

We wish particularly to call the Court's attention to the question and answer set out in haec verba in the transcript (255). This question on cross-examination was somewhat involved and was propounded in the negative. We submit that, upon a careful reading of this question and answer, it will appear that the witness, when he answered "No, those records are only sources of original entry", by the use of the words "those records" referred to the original evidences of the transaction made at the time the transaction takes place, which are referred to in the last clause in the

question, and that the words "those records" in the answer cannot possibly be made to refer to Government's Exhibits 34 to 39 for identification, as this construction would make the answer an incorrect one. We do not believe that even appellants will contend that the questioned exhibits were sources of original entry. The same witness further testified that information received daily from the various stores was compiled from their cash register sales and entered into the regular accounting at the general office (256). It was these cash register records and similar records which witness referred to as "sources of original entry". Witness further testified that sufficient information could be obtained from the books marked for identification to determine the operating expenses, administrative expenses and the net profit and loss of the company. In fact, the information could be obtained from the general ledger (257), Government's Exhibit 39 for identification.

Government's witness G. C. Partee testified (258) that he was employed by the company from January, 1929, to the time of the receivership, as bookkeeper, auditor, secretary and treasurer. At the time Brandt left the company, Partee became auditor and the books were kept under his supervision up to October, 1930 (258), and they were kept in the regular course of business (259). It is well to note here that the books were not used as a basis of any testimony or exhibits concerning the condition of the company after September 30, 1930, and up to that date the books were sufficiently identified. This witness also testified that a total profit and loss statement could be secured from the general ledger (261), Government's Exhibit 39 for identification. This exhibit, the gen-

eral ledger, is a book of original entries. It was in Court and made available to appellants.

Government's witness Earhart, the receiver in the State Court, also identified the books as the books and records of the company (266).

Government's witness Null, the accountant who audited the books for the receiver, identified them (358-359). He also testified that the statement (Government's Exhibit 90) could be prepared from the ledger, and that he could have prepared Government's Exhibit 91 without having made an audit of all the records of the company (383). He further testified that Government's Exhibit 91 was made from the "books in Court" (388) and that the source of his analysis would be limited to the books and records in Court (386). We quote from his testimony, in the transcript:

> "The original entries are here now. Those are the original entries (386). * * * As I stated the books of original entry are in Court, but the original documents back of the books of original entry are not in Court." (389).

It is true that all of the records of the company were not in Court, and some of the original records were not in Court, but all of the original records necessary as a basis for the accountant's testimony and said exhibits, were in Court.

We believe the foregoing excerpts from the record and the testimony of the Government witnesses show ample identification of Government's Exhibits 34 to

39 for identification for the period up to September 30, 1930.

Stephens v. *United States*, 41 F. (2d) 440, 444.

Lewis v. *United States*, 38 F. (2d) 406, 414 (C. C. A. 9).

Foster v. *United States*, 178 Fed. 165, 174.

Quoting from the Stephens case, supra:

> "Ordinarily the party offering such testimony should be required to produce in court or to make available for his opponent's use the documents and books used by the witness, but even that rule is not universally followed and where recognized it is subject to exceptions." (41 F. (2d) 444).

Quoting from the decision of this Court in the Lewis case, supra:

> "The appellants also objected that no proper foundation was laid for the introduction of the books and also to their use for ascertaining the financial condition of the company, on the ground that all of the books of the company and all of its subsidiary and allied corporations were not produced. It was shown that the books produced were the books of account of the company kept for the purpose of recording the business transactions in which the company was involved. This was a sufficient foundation for their introduction for the purpose for which they were offered. If it had been sought to prove some special charge in the

books as a basis for a recovery against the appellants, more evidence concerning the individual book entries involved might have been necessary to make such entries evidence in favor of the company against a third party, but this question is not involved here." (38 F. (2d) 414).

Appellants make much of the testimony of the witnesses on cross-examination, in which they listed some of the records of the company which were not in court. The fact remains, however, that the books in Court and identified were original records and the only records necessary to determine the financial status of the company or to determine the profit and loss of the company. We know of no rule of evidence, and none has been cited by appellants, which would place the overwhelming burden on the Government of producing every voucher, check, sales slip and other subsidiary information that is all merged in the original books of entry in Court.

Appellants also place much stress upon Government witness Null's testimony that, from an examination of the books in Court, he could not certify to an audit based upon those books. To understand this statement, we must understand and take into consideration what is meant by a "certified audit". We believe that the Court will take judicial knowledge of the fact that in order to certify an audit, every entry must be checked against bank accounts, sales slips, checks, vouchers, wholesale receipts, etc. The significance of the word "certify" is clearly brought out in Null's testimony when he says - "In other words, in order to *verify*, I would say *certify*, to that statement

as to its true and correct condition, those books are not sufficient" (369).

It is evident from this statement that what Null meant was that, in the event he was employed to make an audit of the books of any company and required to certify to that audit, he would necessarily have to check the entire records of the company. Such an audit is not necessary, however, where books which contain sufficient information to determine certain facts have been identified, as the books in question were identified by the parties under whose supervision they were kept. It is a fact, however, that Null made such an audit for the receiver and we have his testimony, in addition to the testimony of other witnesses, based upon that audit, that the books in Court were the books of the company and were correct, and it is the Government's contention that, for the purpose for which the books were used, all that the Court or jury needed to be interested in was what Government's Exhibits 34 to 39 for identification themselves reflected. They contained all the information necessary to determine the fact required to be proved. Appellants' contention that the books in question were not correct is based solely upon the claim that they were kept by a self-confessed manipulator and that they contained at least one fictitious entry. This is not borne out by the testimony in evidence. This phase of the case, covered by Government's witness Brandt, will be discussed later in this brief in answer to appellant's Proposition IV. For the sake of brevity, we will not discuss it at this time.

III

ADMISSION IN EVIDENCE OF RECORDS FROM INTERNAL REVENUE OFFICE

Government's Exhibits 109 and 110 were records kept in the office of the Collector of Internal Revenue for Arizona and were introduced in evidence to show that the company had filed income tax returns showing operating losses for the years 1929 and 1930. Appellants contend that the admission of these records constituted prejudicial error.

The case *In re Epstein*, 4 F. (2d) 529, cited by appellants in support of this proposition, is not determinative of the question here involved. All that the Epstein case decides is that the Commissioner of Internal Revenue is authorized, under the statute, to furnish a copy of the income tax return to the person making the same, and to his trustee in bankruptcy, and that the same was admissible in evidence.

The same is true of the case of *Lewis* v. *United States*, 38 F. (2d) 406, in that all the Court held was that all the copies of income tax returns were admissible to show the condition of the company.

The decision in the case of *Lewy* v. *United States*, 29 F. (2d) 462, is to the same effect and goes no further than the other cases above discussed.

Appellants cite the case of *Corliss* v. *United States*, 7 F. (2d) 455, and say that it is completely determinative of this question. The documents introduced in evidence in the Corliss case were not Government rec-

ords, were not signed and were not properly identified. Oral testimony was permitted to show who had signed the original. The documents were offered in evidence for the purpose of proving that the defendants had made sworn statements to the Government which demonstrated that the company's business was not prosperous. It is clear that this fact could not be proven by unsigned copies, not Government records, and which required oral testimony to supply omissions in the documents, which oral testimony was also clearly inadmissible. There is very little, if any, similarity in the two cases. In the case at bar, the exhibits introduced were formal Government records and, as such, no other identification was necessary. It was not necessary to call as a witness the person who made them.

Heike v. *United States*, 192 Fed. 83, 94, 95.

White v. *United States*, 164 U. S. 100.

In the Heike case, supra, on page 94, the Court said:

> "Such records are not covered by the hearsay rule. It is elementary that they are prima facie evidence of what they purport to record."

In the present case the records in question were evidence then of what they purported to record, namely, that the company had filed income tax returns showing a loss. They were not, as in the Corliss case, relied upon by appellants, offered as evidence of a sworn contradictory statement that the company was prosperous. They were not introduced to show con-

tradictory statements on the part of appellants, nor to show that appellants had knowledge of the fact the company was operating at a loss. That fact had already been established by other testimony. As stated above, the exhibits were evidence of the independent fact that the returns, showing a loss, were filed.

Just as the weighers in the Heike case wrote down the weights observed by them on the scales so, in this case, the officials in the Internal Revenue office wrote down on the exhibits the figures observed by them in the returns filed. The weight to be given this evidence was for the jury. Proof of the condition of the company and the fact that it operated at a loss was so overwhelmingly established beyond any reasonable doubt by the evidence in the case that the introduction of these exhibits, even if erroneous, could not possibly be prejudicial enough to warrant the reversal of this case for a new trial. The president of the company, A. E. Sanders, was on the stand, as were Brandt and Partee, the two men who had charge of the books during practically the entire life of the company. These three men knew more about the condition of the company and its profit and loss than any one else. They were available for cross-examination and were subjected to cross-examination, as was the witness Null on the same question. We submit that this afforded the appellants all of the protection necessary to avoid their being prejudiced.

IV

APPELLANTS' CROSS-EXAMINATION OF WITNESS THOMAS H. BRANDT

This proposition is based upon Specifications of Error 9 and 10. Specification of Error 9 (Appellants' Brief, p. 54) is as follows:

> "The Court erred in sustaining an objection of the plaintiff, United States of America, over the exception of appellants, to an offer of proof by appellants, in full substance as follows:"

Then follows the offer of proof made by appellants at the time of trial (425-427).

Specification of Error 10 (Appellants' Brief, p. 56) assigns as error the ruling of the Court in refusing to admit in evidence appellants' Exhibit "F" for identification, consisting of four checks of the Phoenix Packing Company, a corporation, drawn on The Valley Bank of Phoenix, and signed by Tom H. Brandt, as Secretary-Treasurer, and payable to the order of Tom H. Brandt. Much of appellants' argument on this proposition is devoted to the ruling of the Court excluding from the evidence appellants' Exhibit "E" for identification, which was a statement signed by the witness Brandt. The ruling excluding this exhibit is not covered by Specification of Error 9 or 10 or any other specification in appellants' brief. We submit that this constitutes an abandonment on the part of appellants of any contention that this ruling was erroneous.

Furthermore, no proper foundation was made for the introduction of this exhibit. To impeach a witness by showing a prior contradictory statement, a proper impeaching question must be asked. This question must fix the time and place of the prior statement and the question laying the foundation for impeachment must, in addition, acquaint the witness with the substance at least, if not the exact words, of the alleged prior statement. The questions asked the witness were lacking in all of the foregoing essentials and, furthermore, appellants' attempt at impeachment was on a collateral matter brought out on cross-examination (415-418).

Fiske v. *United States*, 279 Fed. 2.

The witness's answer to such questions on cross-examination was binding on the party propounding the question.

The Saranac, 132 Fed. 936.

We quote from paragraph 5 of the syllabus of the case just cited:

> "Where a witness is asked on cross-examination, if he did not make a certain statement, not relevant to any matter brought out on his direct examination, and denies it, his denial is binding on the party asking the question."

Appellants' Exhibit "E" for identification was offered in evidence for the purpose of impeaching the witness Brandt. The statement offered contained many statements consistent with the witness's testi-

mony. It contained much other matter clearly irrevelant. The entire statement was offered in evidence. The ruling of the Court sustaining objection to this exhibit was proper.

New York Central R. R. Co. v. *Dunbar*, 296 Fed. 57, 60.

We quote the following from the opinion in this case:

> "Upon the trial the defendant in error called employees of the plaintiff in error who previously had made statements in writing to their employer. They were confronted with these statements upon cross-examination. Counsel was permitted, under direction of the court, to inquire as to previous statements made, which involved contradictions in their testimony given upon the trial. It was sought to introduce the full statements, and these were objected to. Much of what was contained in the statements was not in contradiction with their present testimony, while some was. Some statements were irrelevant testimony, and opinions given as to the cause of the injury and conclusions as to who was at fault. These statements were properly excluded. The trial court gave full opportunity to counsel for plaintiff in error in using the statements, where any contradictions existed. There was no error in this ruling."

Appellants say that if they had been permitted to demonstrate to the jury that Brandt, one of the Government's main witnesses, was an embezzler, that the jury would have disregarded his testimony. We know

of only one method by which such proof was possible, and that is by proof of the conviction of the witness of the crime. This is such an elementary and fundamental rule of evidence that we will not burden the Court with citations of the unlimited number of authorities where this rule has been repeatedly announced. We know of no exception to the rule and are surprised that appellants seriously argue that they should have been permitted to impeach a witness in the manner attempted by them at the trial.

The statement itself would not be proof of the facts contained in the statement.

28 R. C. L. 645.

MacLachlan v. *Perry*, 68 F. (2d) 769, 772.

The argument that Brandt's testimony to the effect that the company had no funds with which to pay dividends on December 31, 1929, is contradicted by the statement prepared by him, Government's Exhibit 40 (335), because the statement shows cash on hand in the amount of $51,326.72, is so fallacious as not to require serious consideration. Dividends, of course, are payable out of profit or earned surplus only. The same statement (Exhibit 40) shows current liabilities in the amount of $117,458.33, exceeding several times the amount of cash on hand. This is not the first company which found itself in serious trouble because it had paid dividends out of cash on hand which should have been applied to just obligations to its creditors. This argument on the part of appellants is followed by a more fallacious and illogical one on page 83 of the brief, in connection with the testimony of Brandt that

there was no money to pay dividends in June, 1930. Appellants argue, with apparent earnestness and sincerity, that, because a financial statement of the company as of June 30, 1930, Government's Exhibit 32 (248-250), shows cash on hand in the sum of $45,-334.37, Brandt's testimony is false and is inconsistent with his acts. This argument is made in the face of the uncontradicted testimony that the company borrowed money with which to pay dividends in June, 1930 (330), dividends, which one of the appellants insisted had to be paid (330), and the records show that part of the money with which these dividends were paid was borrowed from one of the appellants (330).

Under this proposition appellants contend that the Court erred in sustaining an objection to the avowal made by appellants as a part of the cross-examination of Brandt (425). As the trial Court stated, the avowal might contain some matters which might be proper subject for cross-examination (427). We do not believe, however, that counsel can burden the Court and opposing counsel with the task of editing an avowal, striking therefrom all objectionable matter and leaving only unobjectionable matter. The avowal must be good in its entirety. If any part of it is bad, a proper objection should be sustained. Appellants' attention was called to this rule of evidence in the colloquy between Court and counsel (428).

An offer of proof must contain but one proposition and it must be specific and not general.

64 C. J. 128, Sec. 148.

The Court is not bound to separate the admissible

from the inadmissible but may reject it as a whole.
64 C. J. 131, Sec. 150.

Under this proposition and throughout their brief appellants contend that Brandt's testimony is not worthy of belief because, they say, he appropriated some of the funds of the company to his own use. This position is not supported by any evidence in the record. Statements of counsel, unsupported by competent testimony, do not constitute evidence or proof of a fact. As we have heretofore pointed out, even the statement (appellants' Exhibit "E" for identification) would not be proof of any fact except that the witness had made such a prior statement.

It would appear that appellants' efforts to discredit the witness Brandt's testimony in the minds of the jury were undertaken on the theory that, like the King who can do no wrong, a defendant can commit no error.

The entry in the books respecting the $5,000 advanced by the company to the Phoenix Packing Company, which appellants say was a fictitious entry and, therefore, so discredited the entire records and books that they should not have been used as a basis for any testimony, was, in fact, not a fictitious entry and did not change the financial status of the company and its profit and loss statement. The $5,000 was checked out of the company's funds, the check being payable to the Phoenix Packing Company (415). The charge on the books was made to the Kansas City unit of the Clarence Saunders Stores (416), with a reimbursement to be made later from that unit (416). The money was advanced to the packing company in order

to meet the requirements of the Corporation Commission on the sale of stock of that company (418). To the extent that the charge was entered against the Kansas City unit rather than the packing company, the entry was incorrect, but it was not fictitious.

Appellants do not advance any logical reason in support of Specification of Error 10, which is included under appellants' Proposition IV. The four checks offered in evidence (422-423), Exhibit "F" for identification, were checks drawn on the funds of the Phoenix Packing Company on deposit in The Valley Bank. How they could have any connection with the Saunders Company is not shown. The $5,000 advanced by the company to the packing company was deposited in the Citizens State Bank at Five Points and not in The Valley Bank (418). If the offer of the checks in evidence was for the purpose of showing that Brandt had embezzled the funds of any corporation, it would not be admissible, because, as we have heretofore pointed out, the only method of showing that a witness has committed a crime is by proof of conviction. We are content to submit this assigned error to the Court by reference to the checks themselves (422, 423).

We have not deemed it necessary to discuss the authorities cited by appellants under Proposition IV, which support the right of cross-examination. We are in full accord with such a principle. The right of cross-examination, however, does not carry with it the right to abrogate and violate those fundamental rules of evidence that have been in force in courts of the United States since the organization of our judicial system. The rights of litigants, as well as the rights of witnesses, demand that these rules be enforced.

V

MOTION FOR A DIRECTED VERDICT

The first point urged under this proposition is that there was no identification of the signature of M. Loveland to Exhibit 43, which is the letter set out in the first count of the indictment, the mailing of which is the offense charged. The record shows that M. Loveland was bookkeeper and stenographer in the employ of appellants (271). Some of the letters sent out by the Bond & Mortgage Company (appellants' corporation) were signed by her as Assistant Secretary (296, 392). Her signature was identified on exhibits in evidence (268). Exhibit 43 was one of a group of letters addressed to the witness Addie Driscoll, the group being marked Government's Exhibit 41 for identification. The letters were then given additional identification marks, 41-A, 41-B, etc. (274). These letters were then identified by Addie Driscoll as having been received by her through the mail (272-274).

Witness Brandt testified that he was familiar with M. Loveland's signature and that the first letter shown him of the group (Exhibit 41 for identification) was signed by Mrs. Loveland (268). A very significant fact which we wish to direct the Court's attention to in connection with Brandt's identification is that the first letter in the group introduced in evidence was Government's Exhibit 43, the indictment letter. The other letters of the group were introduced in evidence as Exhibits 44, 45, etc. All of which indicates that the signature of M. Loveland on Exhibit 43 was identified by Brandt, he having identified the signature of all of the letters of the group (Ex-

hibit 41 for identification) which were introduced in evidence, and the first letter introduced bore the signature of M. Loveland.

Any doubt of that fact is entirely removed when we take into consideration that Exhibit 43 was admitted in evidence without any objection being raised that the signature had not been identified (273). In Assignment of Error XIV (506, 507) no such ground is urged and in the Specification of Error 14 (Appellants' Brief, pp. 60-61), there is a similar lack of mention of any such ground. It is not until the argument under Proposition V, that appellants, by an ingenious reading of the record, urge that there was no identification of the signature. So we respectfully submit that the question of the identification of the signature is not properly before this Court.

There is another final and complete answer to this contention of appellants. There is no possible doubt about the identification of M. Loveland's signature on some of the exhibits offered and admitted in evidence (268). Exhibit 44, with her signature, was admitted in evidence without any objection being interposed by appellants (274). With Exhibit 44 in evidence, the question of the proof of the signature on Exhibit 43 and whether or not it was M. Loveland's, was for the jury, even if there had been no other identification. Evidence of the mailing of the indictment letter is amply supplied by the testimony of Margaret Romley (271), she having testified to the general custom in regard to the handling of the letters and circulars under the direction of appellant Gus Greenbaum, the contents of the letter itself, identified as one in reply

to one received by appellants' company from Mrs. Driscoll.

The mailing of a letter may be shown by the custom in the course of a man's private office and business.

Watlington v. *United States*, 233 Fed. 247.

Knickerbocker Life Ins. Co., v. *Pendleton*, 115 U. S. 339.

Evidence that appellants dominated the affairs of the company (the Greenbaum brothers and the Bond & Mortgage Company) and exercised control of its business and that letters were written on the stationery of the company, and seemingly from its place of business, is sufficient, together with other facts in the record, to justify the finding that the appellants caused such letter to be placed in the post office.

Levinson v. *United States*, 5 F. (2d) 567.

McIntyre v. *United States*, 49 F. (2d) 769.

Havener v. *United States*, 49 F. (2d) 196.

Cochran v. *United States*, 41 F. (2d) 193.

Part of appellants' argument in support of this proposition is based upon the alleged defect in the indictment. That question has been sufficiently discussed elsewhere in this brief. Appellants contend further, however, that the indictment charged that certain important events resulted from the acts of all the defendants, including appellants, and that there was no proof of appellants' participation in all of the acts and that other acts, such as selling the stock, were

charged against all of the defendants, and that the proof shows that defendant A. E. Sanders had no connection with the sale of stock. The same argument is advanced in connection with the allegations and proof regarding H. D. Sanders, a defendant named in the indictment. As a matter of fact, appellants did have something to do with the organization of the company and the securing of the franchise from Clarence Saunders, and A. E. Sanders had something to do with the sale of stock. As president of the company, he must have signed some of the certificates, and we know from the record that he signed some of the letters in evidence. We do not deem it necessary, however, to point out to the Court the record as to those matters. It is a well-known principle of law, as we have stated in our argument under Proposition I, that each one of the schemers need not participate in every act done in the furtherance of the scheme. In fact, he may not know what some of his partners are doing but he is bound by their acts.

Silkworth v. *United States*, 10 F. (2d) 711.

Schwartzberg v. *United States*, 241 Fed. 348.

Wilson v. *United States*, 190 Fed. 427.

The failure of the Government, as appellants' claim, to prove all of the allegations of the indictment, would not invalidate the verdict or judgment. All that is required is to prove enough facts to establish the necessary elements of the crime. We believe that in the discussion so far in this brief we have shown by the record abundant evidence of all the elements of the crime charged, and the guilt of appellants has been

proven beyond all reasonable doubt. That the Government alleged more than was necessary, cannot save appellants from the responsibility of the acts charged and proven.

Appellants' sale of stock resulted in receipt by the company of approximately $800,000. Appellants, in their brief (pp. 20, 211) offer the fact of the large amount of money procured through their efforts as a mitigating circumstance, if not a complete defense. It is the first case that has come to our attention where the receipt of a large sum of money, obtained through false representations and the use of the mails, has been urged in mitigation of a crime.

In addition to the company stock sold, appellants sold much of their own stock, including 20,000 shares given them by A. E. Sanders, and these sales were made during the time when stock sales, ostensibly for the benefit of the company, were being made (392, 403). In concluding their argument under this proposition, appellants contend that the letter of April 9, 1930 (Exhibit 43), was not mailed in furtherance of the alleged scheme. The letter on its face shows it was in response to an inquiry by Mrs. Driscoll, who had purchased stock through appellants. It would undoubtedly have been embarrassing to appellants in April, 1930, to have a dissatisfied customer. At that time and during the succeeding months they were not only selling stock of the company but were selling their privately owned stock in the company. If the suspicions of Mrs. Driscoll, or any other stockholder, became aroused and there was any unfavorable publicity, it would have seriously interfered with the plans of appellants and partly, at least, defeated their scheme.

It was necessary to keep Mrs. Driscoll and all other stockholders, as well as prospective purchasers, from discovering the truth. The letter of April 9, 1930, in which the selling price of the stock was placed at $10.-00 per share, would have a tendency to lull into a sense of security one who had purchased stock in the company at $5.00 or $7.50 per share.

Preeman v. *United States*, 244 Fed. 1, 9.

Farmer v. *United States*, 223 Fed. 903, 910.

Newingham v. *United States*, 4 F. (2d) 490.

Lewis v. *United States*, 38 F. (2d) 406.

We quote from the opinion in the Lewis case, supra:

> "It is contended that this letter was not mailed in pursuance of the scheme to defraud alleged in the indictment. It was used for the transmission of information in relation thereto, and contained a part of the proceeds of the transaction with A. M. Epstein and his associates, brought about by some of the fraudulent representations set out in the indictment. The letter was mailed as a part of the fraudulent scheme, and to aid in effecting it. The notes were still being offered to the public, and the tendency of the letter was to lull the recipient into a false sense of security as to the value of the notes he had received. This was sufficient to bring the letter under the condemnation of the statute." (38 F. (2d) 415).

The contention of appellants under this proposition and throughout the brief that there was a failure

to prove the charge was based upon the assumption that much of the evidence introduced was inadmissible and should be disregarded. We feel a determination of the admissibility of the evidence based upon the books and records, as well as a determination of the question of variance raised by Proposition VI, will be determinative of the question of the sufficiency of the evidence. We will, therefore, pretermit any discussion or review of the evidence as a whole at this time.

VI

VARIANCE BETWEEN ALLEGATIONS AND PROOF

Appellants contend under this proposition that there was a variance between the allegations in the indictment and the proof, and that the Government attempted to prove two distinct schemes. The law applicable to this proposition has been discussed and the authorities cited in our discussion of Proposition I. We will, therefore, confine our discussion here to the evidence relied upon by appellants in support of Proposition VI and briefly restate the principles of law hereinbefore more fully set out.

The fact that there was not sufficient evidence to connect the defendant H. D. Sanders and his acts with the scheme charged, does not make the conviction of appellants defective or erroneous. It frequently happens in cases of this nature that one or more of the defendants are discharged by the Court for lack of evidence or acquitted by the jury because of insufficient proof and, at the same time, conviction of other defendants named in the same indictment upheld. We

disagree with appellants in their statement that the principle of law applicable to conspiracy cases, to the effect that it is not necessary for such defendant to take part in every phase of the venture, does not apply to a case of this kind.

49 C. J. 1209 (Sec. 236).

Silkworth v. *United States*, 10 F. (2d) 711.

Schwartzberg v. *United States*, 241 Fed. 348.

Wilson v. *United States*, 190 Fed. 427.

The so-called two adventures mentioned by appellants, namely, the sale of stock in the company and securing the exchange of stock of that company for stock in another company, could, as we said under Proposition I, easily be part of the original scheme. The fact, that incidental to defrauding the original purchasers, the company itself, or others, were also defrauded would not necessarily act as a purification of the original fraud intended.

It must be remembered, in connection with the U-Save Holding Corporation, and the other corporations with which appellants are not connected by the evidence, that A. E. Sanders was a party defendant and on trial when the exhibits concerning these corporations were introduced in evidence. In order to make the transactions in connection with these companies and H. D. Sanders a part of the original scheme, it would not be necessary to prove that all of the associates of H. D. Sanders and A. E. Sanders were parties to the original scheme. Such associates might

have innocently taken part in these transactions.

It is clear from the principles laid down in the case of *Terry* v. *United States*, 7 F. (2d) 28, cited by appellants, that the only one who could gain any advantage by a failure of proof as to the activities of H. D. Sanders would be H. D. Sanders and not these appellants.

The case of *DeLuca* v. *United States*, 299 Fed. 741, cited by appellants, involved the consolidation of two indictments charging separate acts and separate offenses. Obviously, the case is not applicable.

In the case of *McElroy* v. *United States*, 164 U. S. 76, cited by appellants, the parties were not the same and the offenses were in no wise parts of the same transaction and were dependent upon evidence of a different set of facts. Neither a conspiracy nor a scheme to defraud was charged. The crimes joined were murder of two different persons and the burning of a dwelling house.

We have studiously but vainly endeavored to find any applicability to the case at bar of the quotation from *Tinsley* v. *United States*, 43 F. (2d) 890, found on page 206 of appellants' brief, although we concede that the principle announced is sound law. In the Tinsley case, the conviction of two of the defendants under the conspiracy count was upheld in spite of the fact that evidence was introduced concerning the activities of other defendants, which activities the Court held were no part of the conspiracy charged and the judgment as to those defendants was reversed. Had H. D. Sanders been convicted on the evidence in this

case, we apprehend that this Court would likewise reverse the judgment as to him but affirm it as to appellants, whose connection with the scheme charged has been established by the evidence. We submit the Tinsley case in support of the Government's position in this case.

We also adopt the case of *Wyatt* v. *United States*, 23 F. (2d) 791, cited by appellants, as authority in support of appellants' conviction. We quote from the opinion on page 792:

> "But they maintain that the evidence failed to prove that all had breathed together or conspired to do the elaborately extended and lengthily continued network of acts evidencing the conspiracy charged. Certainly we shall not review the conduct of all of the individuals, accused and not accused, who were implicated in this running or revolving combination; nor shall we trace their relations one to another in their various and devious transactions, for that can only be done be repeating the greater part of many hundred pages of the record. We shall merely announce our conclusions as to whether, on the only substantial question raised by the writ of error, there is evidence that sustains the convictions."

The Court then proceeded to sustain the conviction of those defendants as to whom there was evidence connecting them with the scheme.

The case of *Marcante* v. *United States*, 49 F. (2d) 156, cited by appellants, supports the Government's

position on many of the issues in this case. We quote from the opinion on page 156:

> "The trial court overruled a demurrer to the indictment, and this ruling is assigned as error. The trial court was right. There is no doubt that there can be a conspiracy to violate the liquor laws in a dozen different localities; such a conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other or the part played by others; a member need not know all the details of the plan or the operation; he must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose."

Again, at page 158:

> "It is elemental that the Government need not prove all the allegations."

The reversal in the Marcante case, supra, is based on the ground that the conspiracy alleged was not proven. The proof disclosed two conspiracies by two different groups. In the present case there was proof of one conspiracy.

VII

FAILURE TO PROVE A SCHEME

In support of this proposition appellants quote from the testimony of A. E. Sanders, on pages 210 and 211 of their brief. The answers to the questions there

quoted are not evidence of any fact, but mere conclusions of law on the part of the witness. Counsel in propounding these questions left to the witness the determination of what constitutes fraud on the public and what constitutes unlawful acts. We are confident that the Court will find ample evidence in the record to prove the scheme charged and to prove actions on the part of appellants in furtherance of such scheme. Much of this evidence has been repeated and referred to in this brief and we will not repeat it here. The other statement taken from the record (349), and quoted on page 211 of appellants' brief, is merely a statement made by the witness to his counsel and counsel for appellants in a conference while he was still on trial and before his plea of nolle contendere. It is not evidence given at the trial and is not proof of the truth of the facts therein stated, but is merely evidence that he made such a prior statement.

It is under this proposition that appellants advance the theory that because of the large amount of money obtained by them as a result of their false representations, they should not have been convicted. Much of the rest of the argument under this proposition is devoted to the success and progress of the company and the reasons for its ultimate failure, all of which is immaterial and beside the issue. The success or failure of the enterprise has no bearing on the guilt or innocence of appellants. Fraudulent representations and the use of the United States mails are prohibited in connection with successful enterprises, as well as unsuccessful ones.

Foshay v. *United States*, 68 F. (2d) 205.

We quote from this case:

> "No amount of honest belief that corporate enterprises will ultimately make money for stockholders will excuse false representations sent through mail to obtain money for such enterprises."

Foster v. *United States*, 178 Fed. 165, 172.

Knickerbocker Merchandise Co. v. *United States*, 13 F. (2d) 544, 546.

VIII

EXCEPTION TO INSTRUCTION

This proposition is based upon Assignment of Error XXVIII (523) and Specification of Error 19 (Appellants' brief, pp. 65-66). Both the assignment of error and the specification of error enlarged the grounds upon which the exception was taken to the instruction. The only ground mentioned in the exception was that the phrase "substantial practices" was not defined (481). There was no mention of the phrase "within the lines of the charge" and, of course, under the rules of Court and the authorities, the trial Court's attention must be directly called to the alleged error in the charge, in order that the Court be given the opportunity to make any necessary corrections.

Rule 30, United States District Court for the District of Arizona.

Baldwin v. *United States*, 72 F. (2d) 810 (C. C. A. 9).

Allis v. *United States*, 155 U. S. 117, 122.

We quote Rule 30, supra:

"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court before the jury have retired that such party excepts to the same, specifying by numbers of paragraphs, or in any other convenient manner, the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to, and specifying the grounds of such exceptions. As to the charge given by the court of its own motion the grounds of exception shall be specific."

We quote from the Allis case, supra:

" 'However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception.' *Harvey* v. *Tyler*, 2 Wall. 328, 339. 'If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed.' *Mouler* v. *Am. Life Ins. Co.*, 111 U. S. 335,

337." (155 U. S. 122).

Wiborg v. *United States*, 163 U. S. 632.

The Court's charge in this case was comprehensive and eminently fair to appellants. The jury was told that it must be proven beyond a reasonable doubt that the "defendants" were cooperating in the scheme or artifice (462) and that before any "defendant" could be held responsible for the acts of any other person connected with the scheme, the act of such other person must be shown to have been in furtherance or execution of the scheme. The jury was also carefully instructed in regard to the fact that H. D. Sanders and A. E. Sanders were not on trial and that it was the guilt or innocence of appellants the jury was called upon to determine (465). The claim by appellants' that the word "defendants" used in the instruction was not limited to appellants, the only ones on trial, is hypertechnical. We cannot conceive that the jury could have been misled or confused. No exception to the use of the word "defendants" was taken. It would not have been error to have instructed the jury that the defendants on trial would be bound by acts of defendants not on trial, where such defendants not on trial were shown by the evidence to have been parties to the scheme. This would apply particularly to the acts of A. E. Sanders.

IX

ERROR CHARGED IN INSTRUCTION

There was no exception taken to the instruction upon which this proposition is based (481), and the

statement following Assignment of Error XXVIII (524), to the effect that appellants duly excepted to such instruction on the ground that it was "prejudicial, unnecessary and not justified by the record", is not supported by the record. No exception whatever was taken to this instruction.

It was clearly within the power and discretion of the Court to give the instruction. Appellants wander from the record to state that this instruction was tendered by an over-zealous prosecutor. We must necessarily follow them off the record and deny requesting the instruction. The illustration used by the Court was apt and clearly made. The evidence shows the cupidity of the victims of appellants' scheme. It was this cupidity and the eagerness for large returns on the part of the public which aided appellants in their scheme and knowledge on the part of appellants of the existence of such cupidity which induced and urged them to undertake it.

CONCLUSION

We believe that the undisputed evidence in this case conclusively shows that appellants instigated the scheme which started with the organization of the company. From that time on their activities were continuous. They took part in securing the franchise from Clarence Saunders. They exclusively handled the sale of the stock of the company. Practically all of the letters and circulars concerning sale of stock was prepared in their office and was sent out over their signatures, or the stamped signature of A. E. Sanders, affixed in their office. They are, therefore, directly responsible for the misrepresentations alleged and

proven. They knew the condition of the company and also were aware of the payment of dividends out of capital, one of the appellants loaning part of the money for the purpose of making one dividend payment and insisting that the dividend must be paid. The evidence of the use of the mails by the mailing of the indictment letter is uncontradicted.

In the face of this record, the jury could not have consistently returned any verdict other than that of guilty. The well-known rule that when substantial justice has been done, the verdict will not be disturbed where the errors claimed are technical rather than substantial, applies with particular force to this case. Appellants have had a fair and impartial trial. Substantial justice has been done and the judgment should be affirmed.

Respectfully submitted,

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